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Supreme Court, U. S.
F I L E D
JAN 7 1998
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No. 97-961

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

JAMES CONDIT, JR., et al.,
Petitioners,

v.

HAMILTON COUNTY, OHIO, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE HAMILTON COUNTY COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO

BRIEF OF RESPONDENTS HAMILTON COUNTY, OHIO; BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO; LINCOLN STOKES; SIMON L. LEIS, JR.; DANIEL WOLFANGEL; AND DANIEL LOSITO IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE HAMILTON COUNTY COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO

(COUNSEL ON INSIDE COVER)

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QUESTIONS PRESENTED

I. DOES THIS COURT HAVE JURISDICTION TO GRANT THE WITHIN PETITION FOR A WRIT OF CERTIORARI?

II. ARE COUNTY LAW ENFORCEMENT OFFICERS WHO EXECUTE THE VALID ORDER OF A STATE COURT JUDGE, AND ARE THEREAFTER SUED IN THEIR OFFICIAL CAPACITIES PURSUANT TO 42 U.S.C. §1983 FOR SO DOING, AND THE COUNTY WHICH EMPLOYS THOSE OFFICERS, ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM SUIT?

III. ARE COUNTY LAW ENFORCEMENT OFFICERS WHO EXECUTE THE VALID ORDER OF A STATE COURT JUDGE, AND ARE THEREAFTER SUED IN THEIR INDIVIDUAL CAPACITIES PURSUANT TO 42 U.S.C. §1983 FOR SO DOING, ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM SUIT?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs-Appellants: JAMES J. CONDIT, JR., KATHY CONDIT, ROSEMARY CALLAHAN, DAVID CALLAHAN, MICHAEL O'BRIEN, NANCY O'BRIEN, WARREN SMITH, PAMELA SMITH, ANTHONY TIDWELL, SHEILA TIDWELL, MICHAEL MEYER, SARA MEYER, THOMAS SINGLETON, JASON MILLER, CYNTHIA CONKLIN, DAVID CONKLIN, TERRI CONKLIN, ROGER SPRY, DON JOHNSON, JOSEPH EDWARD MARTIN, JOHN PARKER, TERRY PARKER, JOANNE ENGEL, DANIEL ENGEL, and KATHLEEN ENGEL, a minor by Joanne Engel.

Defendants-Appellees: HAMILTON COUNTY, OHIO; BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO; SIMON L. LEIS, JR.; LINCOLN STOKES; DANIEL WOLFANGEL; DANIEL LOSITO; CITY OF CINCINNATI, OHIO; LAWRENCE E. WHALEN; DONALD HUDSON; AND DANIEL CAIN.

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JURISDICTION

Judge Thomas Crush of the Hamilton County (Ohio) Court of Common Pleas entered his decision on the parties' cross-motions for summary judgment on January 16, 1996 (see Appendix E to petitioners' within petition for a writ of certiorari, hereinafter the "petition"), and his final judgment on January 25, 1996. The Hamilton County Court of Appeals, First Appellate District of Ohio, affirmed the judgment on February 26, 1997 (see Appendix D to the petition). The Supreme Court of Ohio declined to exercise jurisdiction of petitioners' appeal and denied review of the judgment of the court of appeals on June 18, 1997 (see Appendix C to the petition), and denied petitioners' motion for reconsideration on September 3, 1997 (see Appendix B to the petition).

The considerations governing this Court's jurisdiction on a writ of certiorari are enumerated in Rule 10 of the Rules of the Supreme Court of the United States. That rule clearly states, in relevant part, "A petition for a writ of certiorari will only be granted for compelling reasons." In light of the considerations enumerated in Rule 10, this Court does not have jurisdiction to grant the within petition, and thus the petition must be denied. In addition, respondents state that there is no compelling reason for the petition to be granted.

STATEMENT OF THE CASE

A. PROCEDURAL POSTURE.

Petitioners herein (plaintiffs below) filed their complaint in the underlying case (James J. Condit, Jr., et al v. Planned Parenthood Association of Cincinnati, et al.) on June 26, 1987, in the Hamilton County (Ohio) Court of

Common Pleas. The case was assigned to Common Pleas Court Judge Thomas Crush. As a matter of law, judges of a Court of Common Pleas in Ohio are, for 42 U.S.C. §1983 purposes, considered to be state, not county, officials.

Petitioners' complaint was later amended twice. Defendants below included:

1. Hamilton County, Ohio; the Board of County Commissioners of Hamilton County, Ohio (Hon. Guy C. Guckenberger, Hon. John Dowlin and Hon. Robert Bedinghaus); Hon. Simon L. Leis, Jr., the Hamilton County Sheriff; deputy sheriff Col. Wolfangel; deputy sheriff Daniel Losito (the "County defendants", and respondents herein);

2. City of Cincinnati, Lawrence E. Whalen, Donald Hudson and Daniel Cain (the "City defendants", and respondents herein); and

3. Planned Parenthood Association of Cincinnati, Inc., Ann Mitchell, Robert Hatfield, Lynn Estomin, Robert Laufman, Timothy Black and Phil Bonham (the "Planned Parenthood defendants").

The action was filed pursuant to 42 U.S.C. §§1983 and 1985, and state tort law. The gist of the second amended complaint was that respondents violated petitioners' civil and other legal rights when, pursuant to a direct order issued to respondent Sheriff by Judge Crush in another case (**Planned Parenthood v. Project Jericho**) to enforce his injunction in that case regulating abortion protests, respondents arrested petitioners on June 28, 1986, for protesting in violation of the injunction.

All defendants filed respective motions to consolidate the two cases, which Judge Crush granted. Shortly thereafter,

petitioners filed a motion for Judge Crush to recuse himself from the cases, which motion was denied.

Subsequently, all the defendants in the cases filed motions to dismiss under Civ. R. 12(b)(6). The trial court did not dismiss the case as to all claims, but it did grant the dismissal as to certain plaintiffs in regard to certain claims, to-wit: Rosemary and David Callahan, Michael and Nancy O'Brien, Michael and Sara Meyer, Joanne and Daniel Engel and John and Terry Parker, with regard to Causes of Action nos. 1, 2, 3, 5, 6, 8, 9, 12, 13 and 14.

Ultimately, cross-motions for summary judgment were filed, and the parties jointly filed certain stipulations. Respondents' motion for summary judgment was based on five (5) separate grounds: 1) absolute quasi-judicial immunity on all claims; 2) Eleventh Amendment immunity on the federal claims; 3) qualified immunity on the federal claims; 4) lack of an actionable county policy or custom on the federal claims; and 5) statutory immunity on the state law claims.[1]

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[1] The second ground for the motion, the Eleventh Amendment immunity argument, was withdrawn by the County defendants on appeal as inapplicable in a state court proceeding. **Will v. Michigan Dep't. of State Police**, 491 U.S. 58, 63-64 (1989), quoting **Maine v. Thiboutot**, 448 U.S. 1, 9, n. 7 (1980). In its place, respondents attempted to argue what they should have argued in the first place; namely, that, in executing the order of a state court judge, the county law enforcement officers were acting as agents of the state, and not of the county; therefore, as a matter of law, plaintiffs' official capacity §1983 suit against them must be treated as a suit against the State of Ohio, and not as a suit against Hamilton County; however, a state is not a "person" within the meaning of that term as it is used in 42 U.S.C. §1983; and thus, since §1983 only operates to

On January 16, 1996, Judge Crush issued his decision in the case denying the petitioners' motion for partial summary judgment and granting the respondents' motions for summary judgment. Judge Crush apparently granted the respondents' motions for summary judgment solely on the ground of absolute quasi-judicial immunity from suit on all claims. See the trial court's decision, appended to petitioner's within petition as Appendix E. On January 25, 1996, Judge Crush entered final judgment in the matter. On February 23, 1996, petitioners appealed to the Hamilton County Court of Appeals, First Appellate District of Ohio, which affirmed the judgment of the trial court on February 26, 1997. Again, despite respondents arguing all of their other grounds for summary judgment to the court of appeals, the court of appeals appeared to affirm solely on the ground of absolute quasi-judicial immunity from suit on all claims. See the court of appeals' decision, appended to the petition as Appendix D. On April 14, 1997, petitioners appealed to the Supreme Court of Ohio, which declined jurisdiction on June 18, 1997. See

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redress the actionable conduct of a "person", plaintiffs' federal claims against Hamilton County, and against the other County defendants in their official capacities, brought pursuant to §1983 (i.e., plaintiffs' §1983 claims against the state), cannot be maintained. **Will**, **supra**; **Pusey v. City of Youngstown**, 11 F.3d 652 (6th Cir. 1993), cert. denied, __ U.S. __, 114 S.Ct. 2742 (1994); **Scott v. O'Grady**, 975 F.2d 366 (7th Cir. 1992), cert. denied __ U.S. __, 113 S.Ct. 2421 (1993); **Echols v. Parker**, 909 F.2d 795 (5th Cir. 1990); **Association for Children for Enforcement of Support, Inc., et al. v. Ronald Panioto, et al.**, No. C-1-85-1219 (S.D. Ohio Dec. 18, 1986, J. Spiegel; unreported; copy of case located at Appendix A of this brief); **Bachelier, et al. v. Hamilton County, et al.**, No. 90-3725 (6th Cir. April 30, 1991; unreported; copy of case located at Appendix B of this brief).

the Supreme Court of Ohio's entry, appended to the petition as Appendix C. On June 28, 1997, petitioners filed a request for reconsideration, which the Supreme Court of Ohio denied on September 3, 1977. See the Supreme Court of Ohio's reconsideration entry, appended to the petition as Appendix B.

Petitioners filed their within petition for a writ of certiorari on December 2, 1997, and it was placed on the docket on December 10, 1997.

B. FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

The following facts were in the record before all of the lower courts.

In January of 1986, Planned Parenthood Association of Cincinnati, Inc. ("Planned Parenthood") moved The Margaret Sanger Center, a clinic where abortions and other medical services were provided, to 3332 Vine Street in Cincinnati, Ohio. Shortly thereafter, the number of protestors picketing against abortion each week increased significantly.

On March 26, 1986, Planned Parenthood filed a complaint in the Hamilton County Court of Common Pleas against Americans Against Abortion, Right to Life of Greater Cincinnati, Inc., Jericho Project, Tracy Antczak, Jonathan Brockhoeft, Raymond Loebker, and petitioner James Condit, Jr. (**Planned Parenthood v. Project Jericho**). The lawsuit was assigned to Hamilton County Common Pleas Court Judge Thomas Crush, and it sought injunctive relief, alleging that the named defendants and other unnamed persons had engaged in a variety of tortious acts. The parties to this case were all private parties, and there were no Hamilton County agencies,

boards, officials, employees, agents or other representatives who were parties. Hearings on Planned Parenthood's request for an injunction were held in March and April, 1986, during which time Planned Parenthood filed an amended complaint with class action allegations and a motion to certify a defendant class.

On June 20, 1986, Judge Crush granted Planned Parenthood's second motion to amend the complaint and the motion to certify a defendant class. Judge Crush issued a six-page preliminary injunction (hereinafter "the injunction") defining the class and setting out the prohibitions for defendant class members. A true and accurate copy of the injunction is appended to petitioners' within petition as Appendix F.

Respondent Daniel Wolfangel ("Wolfangel") is a duly appointed, qualified and acting deputy sheriff of Hamilton County, Ohio, and has held that position continuously since prior to 1986.

In June of 1986, Wolfangel held the rank of colonel in the Hamilton County Sheriff's Office, and was serving as the commander of the Sheriff's Court Services Division. Service and enforcement of court orders were functions of his division.

On the morning of Friday, June 27, 1986, Wolfangel was present at a hearing that Judge Crush held in the case wherein the judge stated, among other things, that he intended to issue an order to the Sheriff concerning enforcement of the injunction on Saturday, June 28, 1986. Judge Crush stated further that he was going to require all of the following things to occur before an individual could be arrested by the Sheriff for violation of the injunction: service of the injunction by

the Sheriff on the individual; videotaping by Planned Parenthood of the individual's subsequent violation(s); and an affidavit, to be "signed on the spot by someone who knows the facts", and delivered to the Sheriff, charging the individual with the violation(s).

Later that day, Judge Crush issued an "Order To The Sheriff" in the case ("the order"), which ordered the Hamilton County Sheriff to be present at the vicinity of 3332 Vine Street Cincinnati, Ohio (the vicinity of the Margaret Sanger Center) the next day, Saturday, June 28, 1986, between the hours of 8:00 A.M. and 1:00 P.M., and during those hours to enforce the injunction by service of it and arrest of violators, if any, upon whom it had at any time been served. The order further authorized such enforcement at any appropriate time on any day. A true and accurate copy of the order is appended to petitioners' within petition as Appendix G.

As commander of the Sheriff's Court Services Division, it was Wolfangel's responsibility to plan, coordinate and oversee compliance with the order and enforcement of the injunction, subject to the superior authority of the Chief Deputy Sheriff and/or the Sheriff.

At no time between the issuance of the order on Friday, June 27, 1986, and 8:00 A.M. on Saturday, June 28, 1986, did the attorneys for the defendants in the case ever attempt to contact Wolfangel or any other representative of the Sheriff's Office to discuss the order, the Sheriff's intended manner of compliance with it, enforcement of the injunction, or any other matter.

At some point on Friday, June 27, 1986, after Judge Crush had issued the order, plaintiff's (i.e., Planned Parenthood's) attorneys came to Wolfangel's office to discuss

and coordinate compliance with the order and enforcement of the injunction. It was felt that the only way to properly comply with the order and to enforce the injunction would be to follow Judge Crush's verbal requirements stated in open court earlier that day (and as set forth hereinabove) as closely as possible, to wit: for the deputies on site to attempt to serve all persons in the area with a copy of the injunction as they arrived; thereafter, for Planned Parenthood staff to determine who of those served, if anyone, was violating the injunction, and to videotape those violations(s); thereafter, for the Planned Parenthood staffer who observed and determined the violation(s) to execute an affidavit charging the violator with the violation(s), and to deliver the affidavit to a representative of the Sheriff's Office; thereafter, for the Sheriff or a deputy to effect the arrest of the violator so charged on the basis of the Planned Parenthood staffer's affidavit. Wolfangel's understanding of Judge Crush's verbal requirements and written order was that the Sheriff's sole responsibilities thereunder were: 1) to serve the injunction; and 2) to arrest violators of it, if any, upon whom the injunction had been served. Wolfangel further understood Planned Parenthood's responsibilities to be: 1) to determine and videotape any violations; 2) to execute an appropriate affidavit charging an individual with any violations(s) committed; and 3) to deliver such affidavit to the Sheriff as the basis for the arrest of the violator(s). Planned Parenthood's attorneys brought with them for Wolfangel numerous photocopies of the injunction to be used for service the next day, and a copy of the preprinted form "Affidavit Charging Contempt" which they intended to use, and did in fact use, on June 28, 1986. The form affidavit appeared to Wolfangel to conform to what Judge Crush required of such an affidavit.

At no time during this meeting was either observance or violation of injunction violators' civil rights discussed.

This was due to the fact that it was Wolfangel's sincere and educated belief then, as it still is today, that the plan discussed above for compliance with the order and enforcement of the injunction was completely legal, in conformity with what Judge Crush ordered, appropriate, and not in any way in violation of anyone's, including petitioners', constitutional, civil or other legal rights. He can only assume, and he therefore does assume, that this belief was shared by Planned Parenthood's attorneys.

At no time did Wolfangel feel any legal, civil, political, religious or other animosity toward those who were protesting against abortion at the Margaret Sanger Center, including any of the within petitioners. At no time did he have any desire or intention whatsoever to infringe upon, limit or otherwise violate any of their constitutional, civil or other legal rights; to cause, facilitate, or ratify such violations by others; or to participate with others in any way in such violations. At no time did he feel that his conduct or that of any of the other respondents infringed upon, limited or otherwise violated any of the injunction violators' constitutional, civil or other legal rights. Thus, at no time did Wolfangel ever discuss, plan, conspire or otherwise collaborate with anyone else regarding commission of such violations.

Wolfangel's only desire at any time relevant to petitioners' within complaints was to fully, faithfully and properly do his job for the Sheriff by fully, faithfully and properly complying with the trial court's order to the Sheriff for enforcement of the injunction.

On Saturday, June 28, 1986, respondent Sheriff Stokes, Chief Deputy Sheriff Victor Carrelli, Wolfangel and several other deputy sheriffs, including respondent Losito,

were on site at the vicinity of 3332 Vine Street as ordered by Judge Crush. All Sheriff's personnel on site had been fully trained as Ohio Peace Officers, and had been certified as such by the Ohio Peace Officers' Training Council pursuant to Ohio Revised Code ("RC") §109.77.

All Sheriff's deputies on site were instructed that compliance with the order and enforcement of the injunction would follow the procedure outlined hereinabove, and all were ordered to follow that procedure. All deputies were reminded of their duty to comply with the existing Sheriff's Office policy that only the minimum amount of force necessary was to be used in making an arrest (*i.e.*, only such force as was necessary and reasonable to effect the arrest, and no more).

Thereafter, deputies were instructed first to serve copies of the injunction on all who arrived on site, and thereafter to arrest only those who had been served, and against whom a Planned Parenthood staffer had executed an "Affidavit Charging Contempt".

Well over 100 abortion protestors arrived at the vicinity of 3332 Vine Street between the hours of 8:00 A.M. and 10:00 A.M. Service upon all was attempted and, Wolfangel believes, accomplished. The protestors were very verbal and noisy, and the atmosphere they created was very hostile, confrontational and tense. Based upon their behavior, Wolfangel believed violence on their part was probable, as did the other deputies on site. Planned Parenthood staffers videotaped the protest activity.

Shortly after 10:00 A.M., several speeches were delivered by certain of the protestors to the rest of the crowd on the west side of Vine Street, across the street from the

Margaret Sanger Center. After these speeches, several people, including the petitioners herein, crossed Vine street to spots directly in front of the Sanger Center. During the next hour or so, Planned Parenthood staffers continued to videotape the protestors' activity, and a Planned Parenthood staffer executed affidavits charging certain individuals, including petitioners herein, with contempt for violation of the injunction. These affidavits were then delivered to Sheriff's personnel by Planned Parenthood personnel, and all violators, including all petitioners herein, were then arrested on the basis of the Planned Parenthood staffer's sworn affidavits.

To the best of Wolfangel's knowledge at that time, all who were arrested on June 28, 1986, had first been served with a copy of the injunction and had their violation(s) videotaped, and were thereafter arrested pursuant to an "Affidavit Charging Contempt", which affidavit was executed by a Planned Parenthood staffer. Indeed, the typed portion of the affidavit was identical for all of the petitioners herein, and clearly stated that the violator had first been served with a copy of the injunction, and that he or she had thereafter violated the injunction. Those arrested were thereafter transported to the Hamilton County Justice Center or the Hamilton County Youth Detention Center, and were held therein until the conditions for their release, set by Judge Crush, had been met.

The Sheriff's Office had every desire, and made every attempt, to faithfully and properly comply with Judge Crush's "Order To The Sheriff", and to enforce the injunction in a legal and proper manner. To the best of Wolfangel's knowledge at that time, this was accomplished. However, it later was determined that service of the injunction on petitioners Tidwell, Miller, Taylor, Spry, C. Conklin, D. Conklin and Engel was not videotaped, and thus could not

be verified at their contempt hearings, and that petitioners Davis and Johnson were arrested pursuant to signed affidavits which charged that they had committed a violation or violations of the injunction, but which did not specify the exact nature of the violation(s) they had committed.

Ultimately, Judge Crush dismissed the contempt charges against all petitioners.

ARGUMENT

ISSUE #1. THIS COURT DOES NOT HAVE JURISDICTION TO GRANT THE WITHIN PETITION FOR A WRIT OF CERTIORARI.

Rule 10 of the Rules of the Supreme Court of the United States provides, in relevant part, that "A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 goes on to enumerate the considerations governing review on certiorari, the only ones relevant to this proceeding being when:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or of a United States Court of Appeals; [or]
>
> (c) a state court or United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In this case, the "state court of last resort" in Ohio, i.e., the Ohio Supreme Court, did not accept jurisdiction of

petitioners' appeal, and thus did not decide anything. Even if this Court construes the term "court of last resort" to include the Hamilton County Court of Appeals, First Appellate District of Ohio, that court did not decide "an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals". Accordingly, this Court would not have jurisdiction over the within petition under consideration (b) of Rule 10.

Furthermore, the highest Ohio state court that has decided this case, i.e., the Hamilton County Court of Appeals, First Appellate District of Ohio, has neither "decided an important question of federal law that has not been, but should be, settled by this Court", nor has it "decided an important federal question in a way that conflicts with relevant decisions of this Court". Thus, no jurisdiction would lie under consideration (c) of Rule 10.[2]

Additionally, there are no compelling reasons to grant the petition in this case. This case merely involves: 1) the arrest of petitioners by respondents, pursuant to an express court order to respondents, issued by a state court judge, to enforce his injunction by arresting anyone who violated the injunction after first having been served with a copy of it, and 2) the resulting grant of absolute quasi-judicial immunity to the respondents for their compliance with the order. Judge

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[2] The First Appellate District of Ohio is comprised solely of Hamilton County, Ohio. Thus, decisions of the Hamilton County Court of Appeals, First Appellate District of Ohio, are binding only in Hamilton County, Ohio. Ohio Constitution, Article IV, §3; **Linkensdorfer v. Wentzel**, 4 ONP 94, 6 O.Dec. 6; **Kings Powder Co. v. Thrasher**, 20 ONP NS 401, 28 O.Dec. 356; 23 O.Jur.3d, Courts and Judges, §515.

Crush required that the arrests be based upon the sworn affidavit of someone at the scene with personal knowledge of the service of the injunction on the arrestee, and of the arrestee's subsequent violation of it. The respondents' arrest conduct in response to Judge Crush's order was evaluated by the lower courts and found to be in full compliance with the order (see Appendix E to the petition, at page 13a of the appendix, the trial court's decision on summary judgment: "...First and foremost, each of the arrests in question were carried out, by each of the arresting persons, according to the orders of this Court; and, therefore, the arresting persons benefit from the immunity of this Court...")

The trial court went on to correctly identify petitioners' real complaint in the action:

> "...The real complaint, if any, that plaintiffs have is that the persons who signed the affidavits, which provided probable cause for the arrests, signed them erroneously or falsely. Whether this is true or not will never be litigated since plaintiffs have settled with these persons and dismissed them from these actions. Plaintiffs, having voluntarily removed from litigation the only persons who may have wronged them, cannot now be permitted to proceed against persons who acted under the orders of the Court, in the manner established by the Court, and upon probable cause..." **Id.**, at 13-14.

On appeal, the court of appeals reviewed and upheld the trial court's factual findings regarding the respondents' compliance with the trial court's order:

> "...In this case, the propriety of extending immunity is enhanced by the fact that the order at issue has been held to be valid. We also note that appellants have not presented sufficient evidence that the appellees acted beyond the judge's order..."

(See Appendix D to the petition, at page 10a of the appendix, the court of appeals decision.)

Rule 10 of this Court's rules concludes by stating that "...A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law..." And, the within petition, in effect, if not in so many words, asserts both.

Accordingly, respondents respectfully submit that this Court has no jurisdiction to grant the petition, and thus that the petition must be denied.

ISSUE #2. COUNTY LAW ENFORCEMENT OFFICERS WHO ENFORCE THE VALID ORDER OF A STATE COURT JUDGE, AND ARE THEREAFTER SUED IN THEIR OFFICIAL CAPACITIES PURSUANT TO 42 U.S.C. §1983 FOR SO DOING, AND THE COUNTY WHICH EMPLOYS THOSE OFFICERS, ARE ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM SUIT.

On page 12 of their within petition, petitioners state that counties and cities whose policy makers enforce valid state court orders are not entitled to absolute quasi-judicial immunity from suit pursuant to 42 U.S.C. §1983 for so doing, but then immediately concede that "...[this Court] has

never addressed (as an actual holding of a case) the availability of absolute quasi-judicial immunity to cities and counties whose agents enforce a court order..."

Nevertheless, appellants rely heavily on the case of **Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit**, 507 U.S. 163 (1993), as authority that Hamilton County is not entitled to absolute quasi-judicial immunity from suit herein. However, as scrutiny of the **Leatherman** decision reveals, the case conclusively determines only one thing: *i.e.*, that a federal court may not apply a "heightened pleading standard" - one more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure - in civil rights cases alleging municipal liability under 42 U.S.C. § 1983. This is the entire holding of the case. **Leatherman**, 507 U.S., at 164. Thus, **Leatherman** is completely inapposite to the instant case.

As this Court noted in **Leatherman**, at 507 U.S., at 166, the respondents in that case claimed:

> "...that municipalities' freedom from *respondeat superior* liability...necessarily includes immunity from suit. In this sense, respondents assert, municipalities are no different from state of local officials sued in their individual capacity..." (Emphasis added.)

Simply put, the respondents have never taken either of these positions in the instant case, and thus **Leatherman** is factually inapposite to the instant case.

Furthermore, the instant case is not one in which the

respondents, in their official capacities, have attempted to claim qualified immunity. They are well aware that county officials, in their official capacities (and thus counties themselves) are not entitled to the defense of qualified immunity.[3]

Thus, the vast majority of the dicta from **Leatherman** has absolutely no application to the instant case. In this dicta, this Court merely noted that when it last revisited the question of whether municipalities are entitled to some form of "limited" immunity (*i.e.*, in the case of **Owens v. City of Independence**, 445 U.S. 622 (1980)), it did so solely in the context of having to decide whether municipalities were entitled to qualified immunity:

> "...in **Owens**...we rejected a claim that municipalities should be afforded qualified immunity, much like that afforded individual officers, based on the good faith of their agents..." **Leatherman**, 507 U.S., at 166.

Since the instant case has never involved a claim of qualified immunity for the appellees in their official capacities, or for Hamilton County itself, this dicta has no relevance herein whatever.

Yet, in fairness, the dicta quoted by petitioners on pages 13 and 14 of their petition, does go on to say:

"...These decisions [**Owens**, *supra*, **Monroe**

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[3] The respondents did, of course, assert below qualified immunity from suit in their individual, personal capacities, but not in their official capacities.

> v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), and Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)] make it quite clear that...municipalities do not enjoy immunity from suit - either absolute or qualified -under § 1983..." In short, a municipality can be sued under §1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury..." Id.

However, this dicta is neither controlling nor persuasive. Monroe was a very early decision which had baldly held that municipalities were, as the Supreme Court phrased it in Leatherman (507 U.S. at 166), "wholly immune" from suit under § 1983. In overruling Monroe by holding that municipalities could be sued under § 1983, the Monell Court was not confronted, and thus did not deal, with the either the concept or the issue of absolute quasi-judicial immunity. To be more specific, neither Monroe, Monell nor Owens involved the issue which is present in the instant case: *i.e.*, whether a municipality is entitled to absolute quasi-judicial immunity when its officers are sued in their official capacities for doing nothing more than obeying the facially valid order of a state court judge.[4] Thus, those three cases, and

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[4] An Ohio Common Pleas Court Judge is a state not a county official for purposes of liability under 42 U.S.C. §1983. Association for Children for Enforcement of Support, Inc. v. Panioto, Case No. C-1-85-1219, United States District Court, Southern District of Ohio, J. Spiegel, Dec. 18, 1986 (unreported; copy appended hereto as Appendix A); Bachelier, et al. v. Hamilton County, et al., Case No. 90-3725, United States Court of Appeals for the Sixth Circuit, April 30, 1991, p.

Leatherman itself, are all clearly inapposite to the case at bar.

Most importantly, "...[A] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority...", **Stump v. Sparkman** (1978), 435 U.S. 349, 356-357. And, "[I]t is well settled that judicial immunity which has historically protected judges acting in their official capacity ... also attaches to public officials who perform quasi-judicial duties." **Johnson v. Granholm**, 662 F.2d 449 (6th Cir. 1981), cert. denied, 457 U.S. 1120 (1982). Furthermore, as previously noted, the lower courts herein have specifically found that respondents complied faithfully with the enforcement procedure specifically set forth by Judge Crush in open court, and in his "Order to the Sheriff".

Thus, even if this Court were to find Judge Crush's order to be unconstitutional, the respondents would still be entitled to and protected by absolute quasi-judicial immunity. See **Mireles v. Waco** (1991), 502 U.S. 9 (absolute quasi-judicial immunity granted to all defendants despite the police officer defendants faithfully obeying a state court judge's explicit order to "forcibly and with excessive force seize and bring [the attorney/plaintiff] into this courtroom"; emphasis added). In **Doe v. McFaul**, 599 F.Supp. 1421 (N.D. Ohio 1984), Doe, the United States District Court applied the doctrine of quasi-judicial immunity to facts analogous to the case at bar. There, plaintiffs filed an action under 42 U.S.C. §1983 against Cuyahoga County (Ohio) and the Cuyahoga County sheriff, alleging that defendants followed and enforced an unconstitutional court order. Specifically, defendants in

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6 (unreported; copy appended hereto as Appendix B, citing **Panioto**).

Doe followed a court order requiring the incarceration of a minor in a regular correctional facility designed for adults. Although the court held that the judge had made a mistake and the order was unconstitutional, it held that both the sheriff and Cuyahoga county were immune pursuant to the doctrine of absolute quasi-judicial immunity. **Id.**, 1430-32. As stated in **Doe**, individual corrections officers, who implemented a judge's illegal and unconstitutional but clearly "judicial" order, shared in his absolute immunity from damages under the doctrine of quasi-judicial immunity. 599 F.Supp at 1430.

Furthermore, if any errors were made with regard to the affidavits themselves, or with regard to the people against whom the affidavits were filed, such errors were clearly the fault of the Planned Parenthood employee who was charged with the responsibility of executing the affidavits (and whom petitioners have released from this litigation), not the fault of any respondent. And, it must be remembered that errors in the enforcement of a court order do not negate the absolute quasi-judicial immunity of the person directed to carry out the order, which immunity, of course, derives from and is equal to the immunity of the judge who issued the order. **Stump**, **Johnson**, **Mireles**, and **Doe**, *supra*.

That the trial court had both subject matter and personal jurisdiction below, and that both Judge Crush's injunction and his "Order to the Sheriff" issued in that case were legally valid, are matters no longer open to question. See **Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho** (1990), 52 Ohio St.3d 56. Thus, Judge Crush was and is entitled to absolute judicial immunity for his issuance of both the injunction and the order. **Stump v. Sparkman**, *supra*, 435 U.S. at 356-357; see also **Kelly v. Whiting** (1985), 17 Ohio St.3d 91, U.S. cert. denied, 106 S.Ct.532.

That the order is facially valid is readily apparent, and petitioners do not argue to the contrary. That the respondents appeared on site on June 28, 1986 and thereafter, and enforced the injunction on that date and thereafter, solely because of and in obedience to that order, is beyond rational argument.

Both federal and Ohio law are well-settled that all who act pursuant to a facially valid court order share in the issuing judge's absolute judicial immunity therefor. Accordingly, under the facts of this case, respondents, including Hamilton County itself, are entitled to absolute quasi-judicial immunity herein from all of petitioners' within claims, both federal and state. **Stump**, **Johnson**, **Mireles**, **Doe**, and **Kelly**, *supra*. "[T]he Sixth Circuit has repeatedly extended the absolute immunity accorded to judges to other individuals involved in the judicial process." **Doe**, at 1431. See also **Wholesale Electric Supply v. Robusky** (1970), 22 Ohio St.2d 181; **Scarso v. Cuyahoga County Dept. of Human Services**, 747 F. Supp. 381 (N.D. Ohio 1989); and **Pugh v. Parrish of St. Tammany**, 875 F.2d 436 (5th Cir. 1989) (absolute prosecutorial immunity granted to a Louisiana parish, which is the equivalent of an Ohio county).

Respondents submit that virtually all of the legal and public policy reasons enumerated in the various authorities cited hereinabove, for according absolute quasi-judicial immunity to those who comply with court orders, fully support the lower courts' grant of absolute quasi-judicial immunity from suit to respondents herein, including to respondent Hamilton County, Ohio. Furthermore, and perhaps even more importantly, the instant case presents another compelling reason why the grant of absolute quasi-judicial immunity to respondent Hamilton County must be left undisturbed: to the degree that petitioners were aggrieved by

their arrests, they were aggrieved solely by the injunction and order issued by Judge Crush, a state official for § 1983 purposes and nothing else. Thus, it simply would be neither fair nor just to penalize the citizens of one Ohio county (i.e., Hamilton County) for actions taken in accordance with a court order issued by a state, not a county, judge.[5]

Petitioners do not even pretend that the dicta they cite in support of their position is binding, and this Court and all parties know that it is not binding. Respondents submit that this dicta is both inapposite and unpersuasive, as well. Accordingly, the lower courts' decisions herein need not be and must not be disturbed.

Based upon all of the foregoing, it is readily apparent that the respondents were acting solely pursuant to and in conformity with a valid order of a state court judge when they arrested petitioners, and thus that all respondents, in all

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[5] In addition to their absolute quasi-judicial immunity from suit, respondents wish to reiterate and to stress that, since they acted as officers of the state and not of Hamilton County when complying with the state court judge's order to the Sheriff, they cannot be sued in their official capacities pursuant to §1983, since the state is not a "person" who can be sued under §1983 - see footnote 1 hereinabove; and that there was no actionable county policy or custom that was the "moving force" behind petitioners' claimed constitutional violations (see **Monell v. New York City Dept. of Social Services**, 436 U.S. 658, 694 (1978); and **Bachelier**, *supra*, at 6: "...[H]ere it is clear that Judge Crush's injunction, not any policy of appellees, was the moving force behind the alleged violation of appellants' constitutional rights..."). These are perhaps respondents' strongest two arguments, but, unfortunately, they were not addressed by any of the lower courts.

capacities sued, Hamilton County included, are entitled to absolute quasi-judicial immunity from suit, on all claims brought by petitioners.

ISSUE #3. COUNTY LAW ENFORCEMENT OFFICERS WHO EXECUTE THE VALID ORDER OF A STATE COURT JUDGE, AND ARE THEREAFTER SUED IN THEIR INDIVIDUAL CAPACITIES PURSUANT TO 42 U.S.C. §1983 FOR SO DOING, ARE ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM SUIT.

Petitioners' second question presented (i.e., "Are law enforcement officials entitled to absolute quasi-judicial immunity from claims brought under 42 U.S.C. §1983 when their manner of enforcing a court order violated the order itself and resulted in constitutional violations?") is a red herring, because, as previously noted herein, both lower courts specifically found from the facts in the record before them that respondents did not violate Judge Crush's "Order to the Sheriff".

The order itself reads, in relevant part:

> The Sheriff of Hamilton County is hereby ordered to be present at the vicinity of 3332 Vine Street on Saturday, June 28, 1986, between the hours of 8:00 A.M. and 1:00 P.M. and during those hours to enforce the injunction filed herein on June 20, 1986. Said enforcement shall be by service of the order and arrest of violators, if any, upon whom the order has at any time been served.

As noted in the record before the lower courts, when

Judge Crush issued his order, he stated on the record, in open Court, *inter alia*,

> I do request orally that no arrests be made unless the service has been photographed, the violation has been photographed and an affidavit signed on the spot by someone who knows the facts. (Emphasis added.)

As the record below also reflects, on the date of the incident in question, respondents attempted to serve, and believed (and still believe) they had served, all persons in the area, including all petitioners, with a copy of the injunction prior to any arrests for violations of the injunction. Planned Parenthood representatives videotaped the entire protest scene continuously, and the only people arrested for contempt by respondents were those against whom an "Affidavit Charging Contempt" had been signed by a Planned Parenthood Staffer. Furthermore, each "Affidavit Charging Contempt" was captioned "State of Ohio, Plaintiff vs. _____, Defendant", stated that it was related to the underlying Common Pleas Court Case and gave that case number, and contained at least the following language:

> Before me, a Notary Public, personally came Robert Hatfield [an employee of Planned Parenthood] who, being duly sworn, according to law, states that on or about June 28, 1986, at Cincinnati, Ohio, [name of appellant] did violate the order of this Court filed and docketed June 20, 1986, and served upon said Defendant before the violation of the order.

Thus, it is clear that the Judge Crush's order was faithfully followed and obeyed by respondents to the best of their

knowledge and ability.

Contempt is *sui generis*, and is neither strictly criminal nor civil. There is in Ohio no set arrest procedure for contempt of court which either Judge Crush's order, or respondents' execution of the order, violated. The facts that service of the injunction on certain of the petitioners was apparently not videotaped and thus could not be verified later on at trial, or that certain of the contempt affidavits were later, after the heat of the moment, found to be incorrect or incomplete, and thus that petitioners were acquitted of contempt or had their contempt charges dismissed, do nothing to invalidate either the Judge Crush's ordered arrest procedure or respondents' faithful compliance with it. As this Court has noted in the past, even in a criminal case (which the instant case is not), "...The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted - indeed, for every suspect released..." **Baker v. McCollan**, 443 U.S. 137, 145 (1979). See also **Graham v. O'Connor**, 490 U.S. 386, 396 (1989) ("...The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, *Hill v. California*, 401 U.S. 797...(1971)...).

As noted previously herein, respondents derive their absolute quasi-judicial immunity from Judge Crush who ordered them to enforce his injunction. Thus respondents, like Judge Crush, do not lose their absolute quasi-judicial immunity simply because there may have been minor unintentional and unknown deviations from the strict letter of the order. **Stump**, **Johnson**, **Mireles**, and **Doe**, *supra*. Surely, if absolute quasi-judicial immunity was accorded to the police officer defendants in **Mireles**, *supra*, it must also be accorded to the respondents under the circumstances of this

case.

CONCLUSION

Based upon all of the foregoing, respondents pray that petitioners within petition for a writ of certiorari be denied, in its entirety, at petitioners' cost and expense.

Respectfully submitted,

JOSEPH T. DETERS
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO

/s/_____

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APPENDIX A

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

No. C-1-85-1219

FILED
December 18, 1986

ASSOCIATION FOR CHILDREN FOR ENFORCEMENT OF SUPPORT, INC., et al.,
Plaintiffs,

v.

RONALD PANIOTO, et al.,
Defendants.

ORDER

This matter came on for consideration of the motion to dismiss of defendant Hamilton County, Ohio (Doc. 38) and plaintiffs' memorandum in opposition (Doc. 41) to which defendant has replied (Doc. 42); defendant Ronald Panioto's motion for summary judgment (Doc. 32) and plaintiffs' memorandum in opposition (Doc. 34), to which defendant has replied (Doc. 35); and plaintiffs' motion for partial summary judgment (Doc. 43), to which defendant has responded (Doc. 47) and plaintiff has replied (Doc. 49).

Since we previously set forth the facts giving rise to this litigation in our order denying injunctive relief (Doc. 27), we will outline the facts very briefly.

Plaintiffs' complaint was filed on August 20, 1985, instituting this action pursuant to 42 U.S.C. §1983, challenging defendants' policy of excluding members of the general public from proceedings of the Domestic Relations Division of the Hamilton County Court of Common Pleas, and plaintiffs requested this Court to render injunctive relief requiring defendants to open the proceedings to the public, declaratory relief, damages, costs, and attorney fees. By amendment on May 14, 1986 (Doc. 86), plaintiffs request a substantial amount of damages against defendant Hamilton County.

Defendant Panioto, in his capacity as Senior judge of the Domestic Relations Division of the Hamilton County Court of Common Pleas, moves for summary judgment in his favor on the basis that this case no longer presents a case or controversy and this action is now moot. At the time this Court ruled on plaintiffs' initial motion for injunctive relief, there was pending in the Hamilton County Municipal Court, a criminal action based on criminal trespass and disorderly conduct charges brought against Geraldine A. Jensen, one of the plaintiffs herein, who was arrested on June 27, 1985 when she attempted to attend and monitor child support proceedings.

On September 3, 1985, a hearing was held before the Honorable Deidra L. Hair, Judge of the Hamilton County Municipal Court, in the case of *State of Ohio v. Geraldine A.*

Jenson. On September 5, 1985, Judge Hair issued an opinion, finding that the blanket exclusion of observers, as a matter of policy, in the absence of some articulated overriding consideration, violates the public's First and Fourteenth Amendment rights.

A motion for leave to appeal the decision of the Hamilton County Municipal Court was filed by the State of Ohio shortly thereafter. After careful consideration, we declined to order injunctive relief on the basis of the strong policy of comity between state and federal judicial systems which mandates a "proper respect for state functions." *Younger v. Harris,* 401 U.S. 37, 44 {1971). Since the time we entered our order, the Court of Appeals declined to review Judge Hair's decision. (Dec. 32, Ex. A, certified copy of entry overruling motion for leave in *State of Ohio v. Geraldine A. Jensen,* No. C-850634 (1 st App. D. Ham. Cty. Oct. 21, 1985)).

Defendant Panioto states, by affidavit, that the Domestic Relations Division of the Hamilton County Court of Common Pleas has, from the date of this Court's decision on September 27, 1985, permitted the public to attend child support enforcement proceedings held before the Referees. (Doc. 33, Affidavit of Ronald Panioto).[1] Therefore, defendant contends that this action is now moot. Plaintiffs respond that the mere voluntary cessation of illegal conduct by a defendant does not deprive a court of jurisdiction in the

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[1] The affidavit of Judge Panioto is attached as "Appendix A".

action and that this action is not moot because of the possibility of recurrence. Defendant Panioto finally claims that notwithstanding how the mootness issue is resolved, he was clothed with absolute judicial immunity.

In considering a motion for summary judgment, the narrow question we must decide is whether there is "no genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. The Court cannot try issues of fact on a Rule 56 motion, but is empowered to determine only whether there are issues to be tried. *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). The moving party "has the burden of showing conclusively that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion." *Smith v. Hudson,* 600 F.2d 60, 63 (6th Cir.) (emphasis original), *cert. denied,* 444 U.S. 986 (1979). And, "while the movant's papers are to be closely scrutinized, those of the opponent are to be viewed indulgently." *Id.* at 63. "[T]he District Court [is] obligated to consider not only the materials specifically offered in support of the motion, but also all 'pleadings, depositions, answers to interrogatories, and admissions' properly on file and thus properly before [the] court." *Id.*, quoting Rule 56(c), Fed. R. Civ. P. Summary judgment "must be used only with extreme caution for it operates to deny a litigant his day in court." *Id.*

After carefully reviewing the papers filed in this case and considering the oral arguments presented by counsel on October 3, 1986, we conclude that this action is moot with

respect to preliminary and injunctive relief based upon judge Panioto's statement to the effect that he will abide by Judge Hair's decision and that he has been doing so since September 27, 1985. The defendant recognizes, and we agree, that the mere voluntary discontinuance of certain conduct may be insufficient to render a case moot. However, in order to satisfy a case or controversy requirement which is a prerequisite to this Court's exercise of jurisdiction, plaintiffs must show that there is a real or immediate threat that the conduct sought to be enjoined is likely to occur again. *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983). In *Lyons,* the court observed "... that past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects. *Id.* at 102.

The question we are most concerned with at present is whether recurrence is probable, as the court stated in *United States of America v. The Cleveland Trust Co.,* 392 F. Spp.. 699 (N.D. Ohio 1974):

> [I]f, in addition to the conduct's discontinuance, there are strong circumstances clearly rendering recurrence entirely improbable, ... a conclusion of mootness is warranted. (citations omitted).

Id. at 707.

It is undisputed that the prior policy of excluding the public from proceedings of the Domestic Relations Division of the Hamilton County Court of Common Pleas was

discontinued on September 27, 1985 and to date has not been reimplemented. Moreover, defendant has assured this Court that he would continue to abide by the decision of Judge Hair. Therefore, we conclude that a recurrence of the alleged wrongful conduct is entirely improbable and this action is now moot.[2]

In addition to the injunctive relief addressed above, plaintiffs have asserted a claim for relief in the form of compensatory and general damages against defendant Hamilton County. In paragraph 27 of the amended complaint, plaintiffs allege:

> The policy of Defendant Panioto barring members of the general public from proceedings before referees of the Domestic

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[2] We note that plaintiffs' amended complaint (Doc. 39) seeks only injunctive relief against defendant Panioto and our decision on the mootness issue renders it unnecessary to address the issue of judicial immunity raised by defendant Panioto. Judges presiding over courts of general and limited jurisdictions are absolutely immune from suits for damages, provided the judges did not engage in non-judicial conduct or act in the clear absence of all jurisdiction. *King v. Love,* 766 F.2d 962, 96566 (6th Cir. 1985); *see also, Sevier v. Turner,* 742 F.2d 262,271 (6th Cir. 1984). The Supreme Court has defined a non-judicial act as an action not ordinarily performed by a judicial officer or an act not performed by the judge in his official capacity. *Stump v. Sparkman,* 435 U.S. 349, 362 (1978). Because of our decision on the mootness issue, we need not address the issue of whether excluding members of the public from the proceedings involved herein can be categorized as judicial conduct.

> Relations Division of the Hamilton County Court of Common Pleas is the official act, policy, custom, and practice of Defendant Hamilton County.

In *Monnell v. Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that a local government can be liable in a §1983 action when its official policy or governmental custom is responsible for a deprivation of constitutional rights. Therefore, the local government must be a "moving force" behind the deprivation. "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monnell,* unless proof of the incident includes proof that it was caused by an existing, unconstitutional [local government] policy, which policy can be attributed to a [local government] policy maker." *City of Oklahoma v. Tuttle,* 471 U.S.__ (1985).

Under the Eleventh Amendment, U.S.C.A. Const. Amend. 11, a state or its agencies cannot be sued in federal court without its consent. *Alabama v. Pugh,* 438 U.S. 781 (1978). The defendant Hamilton County argues that this action should be dismissed against it because it cannot be held liable for the acts of a senior Domestic Relations Judge since the judge is a state official rather than a county official. We agree with the parties that the pivotal issue in regard to Hamilton County is whether the Domestic Relations Division of the Hamilton County Court of Common Pleas is an agency of the state or county.

Defendant Hamilton County directs our attention to Article IV of the Ohio Constitution in support of its

contention that the Court of Common Pleas is a state court. Article IV § 1 of the Ohio Constitution states:

> The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme courts as may from time to time be established by law.

Article IV, §4(A) of the Ohio Constitution provides that "there shall be a court of common pleas and such divisions thereof . . . serving each county of the states" and in the interests of justice "two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district . . . ." Any judge of the court of common pleas or its divisions may temporarily hold court in any county. Moreover, the Ohio Supreme Court has general superintendence over all courts in the state and the Chief justice may assign judges of the court of common pleas and its divisions to sit or hold court in any other court of common pleas. *See* Article IV §§5. 6. Ohio Constitution: Ohio Rev. Code §§2503.04 and 141.07.

The gist of defendants' argument is that Judge Panioto cannot be a policy maker for Hamilton County as, pursuant to the Ohio Constitution, he is a member of the state judiciary. Defendants argue that this case is analogous to the Ninth Circuit case of *O'Conner v. State of Nevada*, 686 F.2d 749 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982) wherein the Appellate Court reviewed the case of *O'Conner v. State of Nevada*, 507 F. Spp.. 546 (D. Nev. 1981). The court

concluded that the defendants Supreme Court and Third Judicial District Court of Nevada, were state agencies and therefore were immune from suit in a civil rights action in federal court because of the Eleventh Amendment. U.S.C.A. Const. Amend 11. *See, O'Conner,* 686 F.2d at 750.

Similar to the Ohio Constitution, the Nevada Constitution provides that judicial power of the state is vested in a court system comprised of a Supreme Court, District Court, and justices of the Peace. The state is divided into several districts with each district consisting of one county, except for one district which is comprised of two counties. Like Common Pleas judges in Ohio, District Judges in Nevada are elected by the qualified electors of their respective districts and the Chief justice of the state Supreme Court has judicial assignment powers. *See* Article 6 §§ I, 5, and 19, Nevada Constitution.

The common denominator between the Ohio and Nevada constitutions most apparent to this Court is that in both states supervisory and assignment powers over Common Pleas and District Courts are vested in the higher courts of the state and, although defined for convenience by county boundaries, a district may be comprised of more than one county.

In response, plaintiffs argue that the recent decision of *Pembauer v. City of Cincinnati,* 746 F.2d 337, 341 (6th Cir. 1984), *ruling precluding county liability reversed,* 54 U.S.L.W. 4289 {U.S. 1986} should govern the outcome of this case. Plaintiffs also cite *Crane v. Texas,* 759 F.2d 412 (5th Cir. 1985) as persuasive authority. Although we are

particularly persuaded by the manner in which the Ohio Constitution establishes the state court system, we have considered the following factors espoused in *Pembauer* and *Crane* for determining whether a person is a county official or state official for purposes of § 1983 liability:

1. Whether the official is elected by the residents of the county;

2. Whether the official is the "chief officer" of the county in a given area;

3. Whether the official submits budget requests to the county legislative body, which in turn furnishes his office, books, furniture and other materials;

4. Whether the official's salary and all training expenses are paid out of the general fund; and

5. Whether the official can be regarded as the ultimate repository of county authority.

Although none of these factors is itself determinative, they are important in our consideration. *Pembauer,* 746 F.2d at 341. While a Common Pleas Court judge is elected by the residents of the county, we find that defendant Panioto does not meet the remaining four criteria for determining that he is a county official.

We conclude that defendant Panioto, as Common Pleas Judge of the Domestic Relations Division, is not a

"chief officer" of Hamilton County. Unlike the county prosecutor or sheriff in *Pembauer,* a domestic relations judge reports to the Superior Court in Ohio.[3] Although a domestic relations judge in Ohio is ultimately responsible to the electorate, we question what the County Commissions of Hamilton County could do if they were vehemently opposed to the judge's policies. Furthermore, pursuant to the Ohio Constitution, a Judge of the Court of Common Pleas, of which the domestic relations division is a part, has statewide jurisdiction, may hold court in any county, is supervised by the Ohio Supreme Court, and is compensated, at least in part, from the state treasury. Ohio Rev. Code §141.04. Therefore, we find that defendant Panioto is not a county official for purposes of the Eleventh Amendment and Hamilton County's motion to dismiss should be granted.

Accordingly, the motion of defendant Hamilton County, Ohio (Doc. 38) and defendant Ronald Panioto's motion for summary judgment (Doc. 32) are hereby granted and this action is dismissed.

SO ORDERED.

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[3] Plaintiffs also cite *Crane v. Texas,* 759 F.2d 412 (5th Cir. 1985) and *Familias Unidas v. Briscoe,* 619 F.2d 391 (5th Cir. 1980) in support of their position. However, these judges were the executive officers of the administrative council for the Texas counties. Unlike a domestic relations judge in Ohio, a county judge in Texas presides over the County Commissions Court which is the chief administrative body in the county. *See, Crane,* 759 F.2d at 420,429.

/s/_____
S. Arthur Spiegel
United States District Judge

APPENDIX B

No. 90-3725

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
April 30, 1991
LEONARD GREEN, CLERK

VIRGINIA BACHELIER, et al.,
Plaintiffs-Appellants,

v.

HAMILTON COUNTY, OHIO, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio,
Western Division

BEFORE: KENNEDY AND RYAN, Circuit Judges, and FEIKENS, Senior District Judge.[1]

[1] The Honorable John Feikens, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

FEIKENS. Appellants brought suit in the United States District Court for the Southern District of Ohio, alleging claims under 42 U.S.C. §1983 against the City of Cincinnati, Hamilton County, and certain County officers, in their official capacities, for their role in enforcing an injunction issued by Hamilton County Court of Common Pleas Judge Thomas Crush. The district court dismissed appellants' claims. For the reasons set forth below, we AFFIRM the holding of the district court.

I. Background

Appellants are twenty-eight, persons who attempted to picket and protest at the Margaret Sanger Center ("Center") located at 3332 Vine Street in Cincinnati, Ohio. The Center is an abortion clinic operated by Planned Parenthood Association of Cincinnati ("Planned Parenthood").

On March 26, 1986, as a result of picketing at the Center, Planned Parenthood filed a lawsuit in the Hamilton County Court of Common Pleas, seeking a temporary restraining order, preliminary injunction and permanent injunction against certain individuals and organizations. See Planned Parenthood v. Project Jericho, et al., No. A8602417 (1986). Planned Parenthood's complaint alleged that certain persons and organizations disrupted the operation of the Center, harassed and intimidated staff and patients, blocked access to the building and created traffic problems.

The case was assigned to Hamilton County Common Pleas Judge Thomas Crush ("Judge Crush"). On April 4, 1986, Judge Crush issued a preliminary injunction against

certain named defendants, prohibiting them from shouting or chanting so loud as to be heard inside the Center, and from blocking the sidewalk. On April 3, 1986 Planned Parenthood filed an amended complaint seeking class certification and an injunction against a defendant class of protestors. On June 20, 1986, Judge Crush entered an order ("Crush injunction") which conditionally certified a defendant class comprised of:

> Persons picketing between the south curb of Louis Avenue and the north curb of Shields Avenue and on both sides of Vine Street from Louis Avenue to Shields Avenue who have been personally served with this order as well as their officers, agents, servants, employees, attorneys, and those persons in active concert and participation with them who received personal service of the order.

The order further defined "persons picketing" as:

> Persons present in the area referred to in this order who are carrying protest or informational signs, passing out literature, speaking publicly, or otherwise engaged in activity, intended to inform, influence, and persuade the public about matters of public interest, including abortion.

The Crush injunction prohibited screaming, chanting, speaking or singing in a manner intended to reach, or which had the effect of reaching patients inside the Center; screaming at patients entering or leaving the Center; blocking the driveway, entrances or exits from the Center or the public walkway in front of it; and mass picketing. The injunction

also limited the number of picketers on certain streets bordering the Center.

After Judge Crush issued the injunction, various defendants were charged with contempt and, after a hearing, found guilty. Of those found guilty, eighteen appealed to the Court of Appeals for Hamilton County.

The court of appeals affirmed the findings of contempt, but reversed the certification of a defendant class. Seventeen defendants appealed their contempt convictions to the Ohio Supreme Court, and Planned Parenthood cross-appealed on the reversal of class certification.

The Ohio Supreme Court upheld the contempt citations, holding that the Crush injunction was a reasonable time, place and manner restriction on appellants' first amendment rights. However, it reversed the court of appeals on the class certification issue, finding that the defendant class was properly certified by Judge Crush. See Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho, 52 Ohio St. 3d 56, 556 N.E.2d 157 (1990).

Thereafter, appellants[2] filed suit in United States District Court against the City of Cincinnati, Hamilton County, and various County officers,[3] for their role in

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[2] Of the twenty eight appellants, six were parties to the Planned Parenthood lawsuit.

[3] None of the appellees were parties to the Planned Parenthood lawsuit.

enforcing the Crush injunction. Counts I through III of appellants' complaint alleged that their rights under the first, fifth, and fourteenth amendments of the United States Constitution were violated by defendants' attempts to enforce the Crush injunction. Count IV alleged that the defendants conspired to enforce the Crush injunction in a discriminatory manner in violation of plaintiffs' right to equal protection under the fourteenth amendment. All of appellants' claims were predicated on 42 U.S.C. S 1983.

The district court dismissed counts I through III of appellants' complaint, finding that the Ohio Supreme Court decision in Planned Parenthood precludes appellants from attacking the constitutionality of the Crush injunction. Alternatively, the district court held that appellants could not state a claim under § 1983 against appellees because the alleged violation of appellants' constitutional rights was due to the facially valid Crush injunction, not to any policy adopted by the City and County. The court dismissed count IV of the complaint because it found no factual basis for appellants' claim of discriminatory enforcement.

II. Analysis

The first question we must address is whether the district court properly held that appellants are precluded from challenging the validity of the Crush injunction because of the Ohio Supreme Court's decision in Planned Parenthood.

Although only six of the appellants were parties to the Planned Parenthood lawsuit, all of the appellants were members of the defendant class to which the Crush injunction

applied. Therefore, appellants are bound by the Ohio Supreme Court's decision upholding the validity of that injunction.[4]

Judicial review of final determinations in state Judicial proceedings can be obtained only in the United States Supreme Court. See, e.g. In Re Sun valley Foods Co., 801 F.2d 186, 189 (6th Cir. 1986). A United States district court "has no authority to review final Judgments of a state court in Judicial proceedings" Id. (quoting District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983)). This is true even though the state court Judgment may have been erroneous. Id. The district court, therefore, properly refused to review the correctness of the Planned Parenthood decision.

Additionally, appellants cannot prevail under 42 U.S.C. S 1983 because they cannot show that an official policy of defendants was the moving force behind their alleged constitutional violation. As the United States Supreme Court held in Kentucky v. Graham, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985):

> [T]o establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right

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[4] The Ohio Supreme Court reviewed the breadth of the injunction and found it to be binding upon parties and non-parties acting in concert or participation with a party who had actual notice of the injunction. Presumably these appellants had actual notice of the injunction since they now claim that enforcement of the injunction deprived them of their constitutional rights.

> .... More is required in an official-capacity action, however, for a governmental entity itself is liable under § 1983 only when the entity itself is a "moving force' behind the deprivation, Polk County v. Dodson, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981) (quoting Monell, supra, 436 U.S., at 694...); thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law (citations omitted).

Here, it is clear that Judge Crush's injunction, not any policy of appellees, was the moving force behind the alleged violation of appellants' constitutional rights. Appellees' decision to enforce a facially valid injunction does not subject them to Section 1983 liability. See Richardson v. City of South Euclid, No. 89-3056 (6th Cir. June 11, 1990). Nor can the order of Judge Crush be imputed to Hamilton County as a policy since Judge Crush is a state, not county, official. See Association for Children for Enforcement of Support, Inc. v. Paniato, No. C-1-85-1219 (S.D. Ohio Dec. 18, 1986).

Appellants also appeal the dismissal of their discriminatory enforcement claim. They argue that the Crush injunction was discriminatorily enforced because Planned Parenthood personnel were allowed to walk freely through restricted picket zones wearing the designation 'clinic escort' while protestors were barred from those areas.

The district court properly rejected this argument. Wearing a badge with the inscribed words "clinic escort" does not constitute picketing within the meaning of the Crush injunction. Accordingly, appellants cannot claim that the

Crush injunction was discriminatorily enforced.

The holding of the district court therefore is AFFIRMED.

IT IS SO ORDERED.